Office-Supreme Court, U.S.
FILED
APR 4 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1961

No. 75

MADELINE C. SCHROEDER,
Appellant,

against

THE CITY OF NEW YORK,
Appellee.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS.

LOUIS B. SCHEINMAN,
Attorney for Appellant,
Woodbourne, N. Y.

Index.

	Page
Additional Statement of the Case	1
Argument	
The Addresses of Appellant were Known to Appellee	1
The Decision of the Court Below is Irreconcilable with the Recent Decisions of this Court on the Question of Due Process	4
There is a Further Substantial Federal Question Involved in the Reliance by the Court of Appeals Upon a Supposed Visible Effect of the Diversion	16
Conclusion	22

CITATIONS.

Page

Cases:

City of New York v. N. Y., N. H. & Ry. Co., 344 U. S. 293 (1953) 4, 12, 13, 15

Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915) 19

Gillespie v. Fort Dodge, D. M. & S. Ry. Co., 203 F. 2d 119 (8th Cir. 1953) 12

Huling v. Kaw Valley R. R. & Improvement Co., 130 U. S. 559 (1889) 3

Matter of Huie (Neilson), 6 A. D. 2d 837, 176 N. Y. S. 2d 193 (1958) 14

Matter of Huie (Riehle), 6 A. D. 2d 838, 176 N. Y. S. 2d 197 (1958) 14

McDonald v. Mabee, 243 U. S. 90 (1917) 15

Milliken v. Meyer, 311 U. S. 457 (1940) 15

Mullane v. Central Hanover Bank & Trust Company, 339 U. S. 306 (1950) 3, 4, 9, 10, 11, 12, 15

Walker v. City of Hutchinson, Kansas, 352 U. S. 112 (1956) 4, 11, 12, 13

Wisconsin Electric Power Co. v. Milwaukee, 352 U. S. 948 (1956) 4, 13, 15

Wuchter v. Pizzutti, 276 U. S. 13 (1928) 19, 22

Page

New York Statutes:

Administrative Code of the City of New York, Title K41-18.0 8

Administrative Code of the City of New York, Title K41-9.0 8

New York, Highway Law, Section 30 9

Other Authorities:

36 Iowa L. Review 47 (1950) 11

39 Iowa L. Review 665 (1954) 11

100 U. Pennsylvania L. Review 305 (1952) 11

30 Mich. St. B. J. 12 (1951) 11

50 Mich. L. Review 124 (1951) 11

Perry "The Mullane Doctrine—a Reappraisal of Statutory Notice Requirements" Current Trends in State Legislation 32 at 118 (1952) 11

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 763.

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS.

Additional Statement of the Case.

The appellant is a resident of New York State, although she is also a resident of New Jersey. She resides at the premises in question during the summer and in Dumont, New Jersey, the remainder of the year (R. 12, par. 11).

Her address at both places was known to the appellee, as will be shown beyond question herein.

ARGUMENT.

The addresses of appellant were known to the appellee.

The appellee gave no personal notice, by letter nor in any other manner to *any* of the property owners along the Neversink River, as the statute did not require the same. Consequently, this claim that appellee was unaware of appellant's address cannot possibly be considered a reason for failing to give some form of personal notice. Instead, it is a much belated excuse which can be seen to be completely untrue for the following reasons.

Prior to the institution of the proceeding, appellee prepared taking maps, and filed a duplicate original in the Orange County Clerk's office on December 5, 1951 (R. 23), a reduced scale copy of same being an exhibit in this case (Def. Ex. A, R. 23).

The index sheet lists the names of the record owners of the parcels taken, and the Court will note that the said Exhibit A, which is the taking map for Neversink Riparian Sec. No. 4, lists Madeline Schroeder as the owner of Parcel 424.

Sheet No. 10 of this map shows the location of Parcel No. 424 (R. 23, Def. Ex. A) and this Court will note that the various parcels are delineated and the river frontages shown to 1/10th of a foot.

These maps were prepared only after deed studies were made by appellee from which deed studies appellee learned the names of the record title holders and the exact amount of river frontages. Appellant's deed recorded in the Orange County Clerk's office, April 19, 1950, in Liber 1154 of Deeds at page 506 (R. 11, par. 1), contains, alongside her name, her address at 30 Seneca Avenue, Dumont, New Jersey. Consequently, when appellee learned her name, it learned her address in New Jersey. Since we must assume that appellee knew the location of the property it was taking, it consequently also knew her address at the premises in question.

Referring to another public record, and since tax bills are mailed in the winter, the tax rolls of this property for the years 1951 and 1952 likewise contained the address of 30 Seneca Avenue, Dumont, New Jersey.

The majority opinion of the New York Court of Appeals paid no heed to this fallacious argument by appellee. In fact, the dissenting opinion said:

> "Here personal service is not required and no personal service was made although such a requirement could have been easily met since the City knew that the plaintiff owned the subject property—it had available her address and no reason appears why such a notice could not have been given."

Does the appellee suggest that if it had had an address, it would have mailed a notice? No notices were mailed to anyone.

In no event is this a case of a missing or unknown owner who has disappeared.

Insofar as the question of residence is concerned, the appellant owns a home and resides at the premises in question during the summer and resides in New Jersey during the remainder of the year (12). Aside from the question of domicile, she is a resident of New York as well as New Jersey. The same postage stamp would have carried a letter to New Jersey as well as to the property. Also, a letter addressed to the premises in New York in January would have been forwarded without additional postage to New Jersey.

Consequently, although *Mullane* clearly undermined *Huling v. Kaw Valley R. & Improvement Co.*, 130 U. S. 559 (1889), said latter case cannot possibly be applicable because of appellant's residence in New York.

However all of this may be, why is it necessary to argue whether or not appellant's address was known, or whether or not she was a resident? It is sufficient to determine in this case that the *statute itself* makes no provision whatever for any form of personal notice, nor even any attempt at it. It is obvious from the decisions below that there is no state court construction of this statute requiring personal notice of any kind, or requiring anything additional to what the statute provides.

Consequently, the statute on its face is short of the minimum requirements of due process.

The decision of the Court below is irreconcilable with the recent decisions of this Court on the question of due process.

There is no way that the majority holding in the Court below can be considered harmonious with *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306 (1950); *City of New York v. N. Y., N. H. & H. Ry. Co.*, 344 U. S. 293 (1953); *Walker v. City of Hutchinson, Kansas*, 352 U. S. 112 (1956); and *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948 (1956).

The holding that is the common denominator to each of the above cases is that constructive notice alone does not comply with due process where the means are at hand to give some form of personal notice, at least an ordinary letter.

The statute here is clearly encompassed by the foregoing.

The manner of the publication of the newspaper notices in this case could not reasonably have been expected to give any notice to property owners in the area of the taking.

The requirements of the statute for publication in the City Record and in two newspapers published in New York City have no bearing upon the question of notice to the property owners in the upstate counties, but are required for the information of officials of the City of New York and possibly its own inhabitants. This leaves only the publication for six weeks in two newspapers published in the county, and the posting of 20 handbills "in the vicinity of the real estate" to be taken or affected.

There is no requirement in the statute that the newspapers selected have any circulation whatever in the taking area. This subject property is approximately 7

miles from Port Jervis and 10 miles from Middletown, both *incorporated cities* in Orange County. Both the Port Jervis Union-Gazette and the Middletown Times Herald not only had circulation in the area of the taking, but were also delivered.

Yet appellee did not advertise in either of these papers. It published instead in the Chester Bulletin of Chester, N. Y., *a third class village*, and in the Valley Dispatch of Warwick, N. Y., an *unincorporated hamlet*, neither of which papers had, nor could have been expected to have, any circulation whatever in the taking area, said latter communities being located at least 20 and 30 miles, respectively, from the taking area, and beyond the two cities that were by-passed.

This is not an isolated phenomenon. In adjoining Sullivan County through which the Neversink runs on the easterly end, in taking areas near Monticello, the county seat, in which no less than three newspapers are published, the appellee went all the way to the westerly boundary of the county, a distance of 35 to 40 miles from the taking area, to publish in a small newspaper in Callicoon, and also in a newspaper in Liberty, 12 miles beyond Monticello.

This hiding of the notices was obviously deliberate. As Judge Dye said in his dissent in the Court below:

> "If constructive service were to be authorized, it could have been provided in some form which was not calculated to go unobserved by the persons to be affected."

The posting of handbills under this statute cannot be considered to be a form of personal service, nor of substituted service.

Handbills were not posted on each property nor affixed to each dwelling.

In Section No. 4 there are 96 numbered river front parcels, and a great many upland parcels with deed rights-of-way across numbered parcels to the river, which upland parcels are not shown on any map and which property rights were treated by appellee as if they did not even exist. For example, in Section No. 4 there is located a development known as Meyers Grove which has in the neighborhood of 100 properties all of which have deed rights to bathe, swim and fish in the Neversink River.

For all of these properties, the statute required 20 posters. These properties extend along at least seven miles of river, or 14 miles of river banks. The statute provides no minimum standards for the type of handbills. In this case cloth posters were used, but the usual onion-skin carbon copy, common in foreclosure notices, election notices, etc., would still comply for lack of statutory standard.

Nineteen were posted on trees and three on poles, said posting having been done on January 22, 1952 (R. 33-37).

Since the Neversink River had been developed as a summer resort area, it was known that most properties would be vacant at that time of year.

It is clearly apparent that appellee intended even the handbills to attract as little attention as possible. The subject property is near the small hamlet of Cuddebackville. This community has a post office, a firehouse, a town clerk's office, a school, at least two general stores as well as a church and gas stations.

Section No. 4 extends from the vicinity of Huguenot and runs through Godeffroy (see map, Exhibit A, *supra*).

Huguenot has a post office, a Grange Hall, a municipal building and office, and general store.

Godeffroy also has a post office, general store and gas station.

Yet, not one handbill was posted in any of these public places!

Any design to attract attention to the handbills would have utilized these places where the posters could be sheltered from the weather and seen and read by local residents. Posting on trees and poles along lanes, dirt roads in the forest and at highway at the time of year it was done, would not accomplish this purpose. In fact, the notice could not be read from a passing automobile and, in order to be read, would require people to walk off the road onto private property, if, in the first place, it could be distinguished from the ordinary "No Trespassing, Hunting or Fishing" signs.

The notices did not contain the names of the persons affected, nor did they advise that any action was required to ensure compensation.

In fact, the notice is merely a notice of motion relating *only* to the application to acquire the right to divert, and returnable on March 14, 1952 (R. 30). Even if seen and read by a property owner, he would have no way of knowing that on the basis of this notice he was to file a claim for compensation, or where, when or how.

The notice referred to a petition and said:

> "described in the petition herein"

which notice was dated January 10, 1952 (R. 30-32), while the petition referred to did not come into existence until February 15, 1952 (R. 48-49).

The statement of the Court below, in the footnote, that the posters were "firmly affixed" is an unwarranted conclusion without basis. It is only known that most disappeared shortly after the posting. A poster attached to the bark of a tree trunk should not really be expected to withstand sleet, ice, snow and rain, and remain on the tree for any period.

The point of all of the foregoing is that the posting of notices was nothing more than merely another form of publication.

It can, by no stretch of the imagination, be considered to be a personal notice to any individual property owner.

Even under those statutes which permit the posting of a notice on the door of a dwelling as a form of substituted service, there are always the requirements (1) that personal service cannot with due diligence be made, and (2) that the affixation of the notice be on the premises of the owner affected.

Since the statute here provides no such standards or requirements with respect to the handbills, such posting does not take this statute out of the rule of the above cited cases.

This Court might be interested in knowing that despite the provisions of K41-18.0 for filing claims with Commissioners of Appraisal, that claims are actually filed with the Corporation Counsel of the City of New York at his office maintained by him in Kingston, Ulster County, New York. The reason is that Commissioners of Appraisal are private citizens, one from the county in which the property is located, one from the City of New York, and the third generally from a neutral county (K41-9.0). They have no office and no announcement or notice of any kind is given when they are appointed of their names and addresses or where claims are to be filed.

It is certainly true that when the statute in question was enacted in 1905, that the counties involved were rural agricultural counties, very sparsely populated, and with very few newspapers. However, by 1952, Orange and Sullivan Counties had developed extensively, particularly in the use of their rivers and lakes as summer resort facilities.

While in 1905 the publication provided by statute may have better accomplished its purpose, the figures of claims not filed in time most eloquently and dramatically prove beyond question that the notice was in fact, and as a practical matter, totally inadequate in 1952.

An ordinary letter addressed to each property owner, advising him of the taking and where to file his claim, and that no further notice would be given, would have avoided this outrageous situation.

Mailing is a simple requirement. Addresses are easily ascertainable from deeds and tax rolls. And then, only if a name and address cannot for some unusual reason be found, posting on the particular premises of the unknown owner could be permitted as the best substitute available.

A condemner should not complain of such procedure. In fact, when the New York State Thruway was constructed from New York City to Buffalo, a distance of 400 miles, it was required under Section 30 of the Highway Law to personally physically serve each owner with an appropriation map and description of his land being taken.

Judge Fuld in the court below sought to distinguish this case from *Mullane* on the ground that the subject of the action here was real property, evidently distinguishing the fact that in *Mullane* the property dealt with was personal property. The learned jurist evidently felt that here there was a physical taking and that consequently, some additional notice was provided by the actual diversion.

We respectfully point out, however, that he overlooked the *Walker* case in which, as here, there was a taking of real property. The learned Court below also completely overlooked the fact that there was no diversion and nothing whatever done in the river until a year and three months *after* the return date of the application which was the subject of the published notices. At the return date

of March 14, 1952, property owners were entitled to present objections to the taking.

Under various New York statutes (e. g., Condemnation Law) the property owner has a right to object to the eminent domain proceedings taken to acquire his property. On the application to condemn (as here) the property owner can raise any one of a number of available objections. For example, on the return date in Section No. 1, four attorneys appeared for various property owners, filed answers to the petition, raising several objections. The main objection was that the taking was not reasonable and that it was not necessary for appellee to take all of the water in the river when considering the needs of the lower riparian owners. The Court reserved decision, and after extensive negotiations, a stipulation was made whereby the answers were withdrawn and the city agreed to release certain quantities of water into the stream. This stipulation was incorporated into the Order of Condemnation. The Court will note the last decretal paragraph in the Order of Condemnation on page 53 of the record, the releases the appellee is required to make. This is the result of the appearances on the return date in Section No. 1, and the objections there made.

The Court will note, therefore, that the right to appear and be heard on the return date is an exceedingly important right, and completely separate and apart from the later proceedings dealing with compensation.

So how then can it be said that the actual diversion which took place more than a year *after* the return date provided any notice of the application to condemn?

In *Mullane* this Court said:

> "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

In *Mullane* this Court took note of a notice which "does not even name those whose attention it is supposed to attract" and also made reference to a situation where the person affected "makes his home outside the area of the newspapers normal circulation" both of which quotations are applicable here.

Furthermore, it is apparent here that there was a deliberate attempt by appellee to seek remote newspapers least likely to give notice, and to post in remote areas during the time of year when it was known that a great number of the properties would be vacant.

Mullane caused much interest to legal writers, Law Revision Commissions and State Legislatures and also met with much favor.

36 Iowa L. Review 47 (1950);
39 Iowa L. Review 665 (1954);
100 U. Pennsylvania L. Review 305 (1952);
30 Mich. St. B. J. 12 (1951);
50 Mich. L. Review 124 (1951);
Perry, "The Mullane Doctrine—A Reappraisal of Statutory Notice Requirements," Current Trends in State Legislation 32 at 118 (1952).

Of course, New York revised Section 100 (c) (12) of the Banking Law to require mailing.

A subsequent article in 39 Iowa L. Review 665 advised that North Carolina revised its N. C. Gen. Stat. §§1-98, *et seq.*, relating to publication and now requires mailing, and that Iowa (Iowa Rule 60, Rule 60.1 added) changed its statute to require mailing of notice or an affidavit that a diligent inquiry was made and that no address was found.

As a matter of fact the Iowa Law Review article above-mentioned actually forecast the *Walker* case. At page 671 it mentioned the inadequacy of the Kansas statute in view of *Mullane!*

Mullane was followed by *Gillespie v. Fort Dodge, D., M. & S. Ry. Co.*, 203 F. 2d 119 (8th Cir., 1953), a bankruptcy case wherein notice by publication was held inadequate where actual notice was possible.

Also following *Mullane* was *City of New York v. New York, N. H. & H. R. R.*, 344 U. S. 293 (1953), in which the rationale of *Mullane* in point was affirmed.

In the most recent decision, the Court reaffirmed the rule laid down in the *Mullane* case. This Court struck down a Kansas statute which required in a condemnation proceeding, notice by either publication or personally, the notice actually given in the *Walker* case having been by publication. The Court said (*Walker v. City of Hutchinson, Kansas*, 352 U. S. 112, 1956):

> "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In *Mullane* we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. *Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.*" (Italics added.)

Walker is the most recent United States Supreme Court case on this question that we know of. It is of interest to know that the situation is more aggravated here and more deserving of relief than that situation existing in said *Walker* case. In said case, Mr. Lee Walker's property was taken and commissioners met without his knowledge and made to him an award for his property in the amount of $725. Mr. Walker was not satisfied with said award when he learned of it, and sought resort to the courts.

In the instant case, Miss Schroeder received and shall receive nothing for her property, unless she prevails here.

At the same term of court with *Walker* was *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948. This case was remanded on the same grounds as *Walker*. Said case involved the levy of assessments by Milwaukee against owners of property abutting on a certain street, notice having been given by publication only, under the city charter. The complaint in a first action asking for cancellation of assessment on grounds of unconstitutionality of statute was dismissed on demurrer. The Supreme Court of Wisconsin, after *Mullane*, and because of an evenly divided court, affirmed 263 Wisc. 111, 56 N. W. 2d 784.

After the decision of the U. S. Supreme Court in *City of New York v. New York, N. H. & H. Ry. Co., supra*, Wisconsin Electric started its action over again, for no new reason other than in view of the *City of New York* case reaffirming and strengthening *Mullane* it decided this time to go to the U. S. Supreme Court. Again a demurrer to the complaint was sustained in the Circuit Court, and on appeal the Wisconsin Supreme Court again affirmed, but this time only on the principle that there must be finality to litigation, and on the theory of "law of the case." 272 Wisc. 575, 76 N. W. 2d 341.

The U. S. Supreme Court remanded, 352 U. S. 948, order amended 352 U. S. 958; and the Supreme Court of Wisconsin reversed, 81 N. W. 2d 298.

The appellee now admits on page 7 of its motion to dismiss, in a converse manner, that where names and addresses are known that publication alone is inadequate. In speaking of the *New York v. N. Y., N. H. & H. Ry. Co.* case, it says:

> "This Court recognized, however (p. 296), that notice by publication may be justified when the names, interests and addresses of persons are unknown."

Appellee cannot and does not claim that appellant was an unknown owner, nor one who was missing or who had disappeared, but merely that it was unaware of her address.

The one and only reason for the failure to mail notices, and there was no other reason, was that the statute itself failed to require it.

The suggestion in the motion to dismiss and also contained in a footnote to the opinion of the learned Court below to the effect that the great number of claims not filed in time may possibly have been due to a lack of interest on the part of the property owners, is the grossest speculation.

It is reasonable to say that if an owner filed his claim, but late, that he does feel that he was affected and that he is entitled to compensation.

There are a large number of cases involving late filed claims in the lower courts in New York. Two of these cases, *Matter of Huie (Neilson)*, 6 A. D. 2d 837, 176 N. Y. S. 2d 193, and *Application of Huie (Riehle)*, 6 A. D. 2d 838, 176 N. Y. S. 2d 197, are representative cases which, in themselves, involve a large number of claims.

We have estimated that the total number of claims actually filed, but late, and pending was about 200, and this figure was never disputed. On the other hand, appellee, which has an exact record of the number of claims filed with them, has never advised any Court as to such number.

We also point out that undoubtedly many property owners much interested failed to file claims when learning of

the proceedings after the Statute of Limitations had expired, simply because they were advised that it was too late.

In any event, the speculation by the learned Court below of the possibility of disinterest by property owners is of the grossest type and completely unsupported by any factual basis.

Due process is based upon the traditional notions of fair play and substantial justice.

Mr. Justice Holmes said, in *McDonald v. Mabee*, 243 U. S. 90:

> "And in states bound together by a Constitution and subject to the 14th Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact. *Baker v. Baker, E. & Co.*, January 8, 1917 (242 U. S. 394, *ante*, 386, 37 Sup. Ct. Rep. 152)."

In *Milliken v. Meyer*, 311 U. S. 457, Mr. Justice Douglas stated (at p. 463):

> "Its adequacy so far as due process is concerned is dependent upon whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice *(McDonald v. Mabee, supra)* implicit in due process are satisfied."

In the case at bar, we have strict compliance with the letter, certainly not the spirit of a statute, the traditional notions of fair play and substantial justice being completely absent.

There is truly no way that the decision of the Court below can be harmonized with the *Mullane, City of New York, Wisconsin Electric Power Co.* or *Walker* cases. We cannot think of any reasonable exception to the great

principles enunciated in said cases that could justify the decision appealed from. We therefore respectfully submit that there is a substantial federal question.

There is a further substantial Federal question involved in the reliance by the Court of Appeals upon a supposed visible effect of the diversion.

The learned Court below undoubtedly placed great reliance upon what it considered to be an additional form of notice, saying that it was of considerable significance that the effect of the diversion was clearly apparent long before the expiration of the Statute of Limitations.

This, of course, can relate only to the question of compensation.

We had pointed out previously in the jurisdictional statement that the diversion occurred in this case two years before the expiration of the statute, and could just as easily have occurred after the Statute of Limitations had already expired, which actually was almost the case in the City's diversion of the Roundout (Jur. Stmt., p. 9); and further that this was a motion on the pleadings alone and this assumption, vigorously denied, was made without any basis in this record (Jur. Stmt., p. 9).

Actually, we say by way of explanation, the effects of the diversion are not clearly visible to a layman, except at a point close to the dam.

The Neversink Dam diverted the river in its entirety at Neversink, Sullivan County, New York, except for certain nominal releases which the taking order required the City to make.

The stream below the dam and within a short distance of the dam is therefore, at times, exceedingly low, the diversion within a mile or so downstream from the dam

being close to 100 per cent. But as the stream winds and turns in its travels to the Delaware River, about 35 miles below the dam, it picks up substantial quantities of water from its tributaries and from ground water in the drainage area of the stream, so that as one travels further downstream the percentage of diversion decreases, the same at the Schroeder property being in the neighborhood of a 50 per cent diversion.

The diversion of a percentage of the stream, even a very high percentage of the stream, does not necessarily substantially lower the height of the stream. The most drastic effect of the diversion is its decrease in velocity of flow.

For example, a natural pool in the river will be full, whether there are 30 million gallons per day coming into it, or 300 million gallons per day. The thing that changes in such an instance is its velocity.

Prior to the diversion, the Neversink was known as a "flashy" stream and on the average of once a year reached flood stage in varying degrees. This high quantity of water scoured and cleansed the bottom of the stream to its natural sand and gravel stone bed.

In its natural condition its temperature was cool at its headwaters and normal in the rest of the stream. The diversion has impounded the waters in the Neversink Reservoir. Under the taking order of March, 1952, minimum releases must be made. However, under the United States Supreme Court decree appointing a River Master, a formula was established whereby when the water in the Delaware River at Montague, New Jersey, falls below a certain point, the City must release additional quantities from its reservoirs. The result of the foregoing is that at times the City releases the minimal quantities from the reservoir at Neversink and at times very substantial quantities. In fact it is true that at times of drought there is

sometimes more water in the river than there would have been without a diversion because of the United States Supreme Court decree.

The waters released are through the bottom of the dam, the temperature being approximately 39.2 degrees F. at the release works.

Consequently, when the releases are high the temperature in the river for many miles downstream is very low. On the other hand, when the releases are low, because of small quantities and velocity of flow the temperature in the river is unusually high. This situation is drastic to fish life, native trout having been practically eliminated from the stream.

The decrease in velocity, although not necessarily decreasing the depth, has reduced the carrying capacity of the stream, silt and sedimentation have coated the stream bottom; algae is most proliferous. The freshets or floods being absent, this accumulation on the bottom continues to build up over the long period of years. Fishing is destroyed. Bathing and swimming made more and more uncomfortable as time goes on.

Yet a layman, having no understanding of the technical reasons for the effects of the diversion and looking only at the height of the stream, knowing that the stream fluctuated greatly in its natural pre-diversion state, at a point 25 miles downstream from the dam in a different county, as at the subject property, could not be expected to conclude at a glance that there had been an artificial diversion by the City of New York for water supply purposes for which he was entitled to be compensated.

The proof of this is found very clearly in the fact that 78 out of 96 riparian numbered parcels in Section No. 4 failed to file their claims in time. Appellee now owns these interests, and refuses to pay compensation.

In *Wuchter v. Pizzuti*, 276 U. S. 13 (1928), a New Jersey motor vehicle statute failed to provide that the Secretary of State mail process to the non-resident. However, in that case, the Secretary of State nevertheless did so. The defendant did not appear and judgment was taken against him.

In a subsequent suit on the execution, the defendant attacked the constitutionality of the New Jersey statute and this Court held:

> "But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by statute. Not having been directed by the statute, it cannot therefore, supply constitutional validity to the statute or to service under it. *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424, 425; *Louisville and Nashville R. R. Co. v. Stock Yards Company*, 212 U. S. 132, 144; *Central of Georgia Ry. Co. v. Wright*, 207 U. S. 127, 138; *Security Trust Co. v. Lexington*, 203 U. S. 398, 409; *Stuart v. Palmer*, 74 N. Y. 183, 188; *Berryhill v. Sepp*, 106 Minn. 458."

Although it is correct that Justices Holmes and Brandeis dissented, Mr. Justice Stone dissented upon other grounds. These dissents do not lessen the import and strength of this case, particularly since an examination of many cases mentioned in Shepard's citations would clearly show the same to be very much the law today. In fact, said case was cited by this Court in the *Walker* case.

In the case of *Coe v. Armour Fertilizer Works*, 237 U. S. 413 (1915), this Court said on page 424:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, which involved the validity of a statute providing for as-

sessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the Court said:

"'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and then opportunity to be heard.'

"The soundness of this doctrine has repeatedly been recognized by this Court. Thus, in *Security Trust & S. B. Co. v. Lexington*, 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87, the Court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes:

"'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute (*Stuart v. Palmer*, 74 N. Y. 183).'

"So, in *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 138, 52 L. Ed. 134, 151, 28 Sup. Ct. Rep. 47, the Court said:

"'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' • • • and in *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said:

"'The law itself must save the parties' rights and not leave them to the discretion of the Courts as such.'"

We respectfully urge that in this case additional notice beyond what is required in the statute must not be left to the grace or favor of the City of New York.

If the statute be upheld, the next condemnation by appellee may have a diversion after the expiration of the Statute of Limitations; sections 20 miles long instead of 7 with the same number of notices; handbills on onion-skin paper on trees in the forest in January. We know, however, that appellee could not do much worse on the newspaper notices, having already shown its inclination to select those most distant from the property but still within the boundaries of the county.

The statement in appellant's motion to dismiss, on page 3, that although appellant alleged lack of knowledge of the taking of her property or of her right to a claim, that she did not allege that she was unaware of the diversion, is nothing more than a play on words. The complaint leaves no doubt as to her lack of knowledge which should not be surprising in view of the fact that 81 per cent of riparian owners in Section 4 failed to file in time.

The suggestion in the motion to dismiss that the very existence of the project provided notice is fallacious. The Neversink project was commenced in 1941. There was nothing to suggest the 1952-1955 period as the precise time to file claims. Further, the premises in question are 25 miles downstream, in a different county and at least 40 road miles away. It is, therefore, unreasonable in fact, and contrary to law, to adopt an assumption that the project was notice to this property owner as to when and where to file a claim.

The suggestion that this appellant had notice because a handbill was attached to a pole alongside a roadway 1,200 feet from her property is inadequate in fact and in law. To speculate or conjecture that posters attached to trees or poles withstood the rigors of weather, removal by people, and any other hazards, to remain over an extended period of time, under pain or penalty of depriving a person of property without notice and compensation, is irresponsible.

The point here is that no notice other than that provided in the statute, or required by state court construction, can cure the defect of the statute by supplying constitutional validity to it, or to service under it (*Wuchter v. Pizzuti, supra*, and cases therein cited).

Appellant never appeared in the proceeding and waived nothing.

The conclusion by the Court below that the diversion provided notice, without factual basis in this record, and vigorously denied by appellant, deprived appellant of a right to a trial on this question of fact.

Whether the Court below, in interpreting the 14th Amendment, can make assumptions that notice was fortuitously had in a manner provided neither by the statute nor by court construction of same, and provided constitutional validity to the statute, raises a substantial federal question.

CONCLUSION.

We respectfully submit that appellant has presented a substantial federal question. Appellant requests that the motion to dismiss be denied, that this Court note jurisdiction and reverse the judgment and orders appealed from.

Dated: April 2, 1962.

Respectfully submitted,

LOUIS B. SCHEINMAN,
Attorney for Appellant,
Office & Post Office Address,
Woodbourne, New York.